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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH Plaintiff/Respondent, vs. EFRAIN M. VILLARREAL, Defendant/Appellant.	Priority No. 2 (incarcerated defendant) Case No. 920730-CA

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INTRODUCTION

The Briefs of Appellant and Appellee have been filed in, or transferred to, this Court. Pursuant to Rules 24 and 26 of the Utah Rules of Appellate Procedure, Appellant files this Reply Brief in response to the Appellee's Brief, which raises new issues.

STATEMENT OF RELEVANT FACTS

The facts in the instant case have been previously addressed by the parties in their respective opening briefs. The facts are also presented at the beginning of each Point in the Argument section of this Brief.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

The statutes and constitutional provisions relevant to determining this case have been reproduced in Appendix 1 of Brief of Appellant.

ARGUMENT

POINT I

THE STANDARD FOR RESOLVING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IS WHETHER COUNSEL'S PERFORMANCE FALLS BELOW AN OBJECTIVE STANDARD OF REASONABLENESS, AND NOT WHETHER COUNSEL GROSSLY DEVIATED FROM PROPER TRIAL COURT PRACTICE.

The State has propounded what it believes is a new standard for what constitutes ineffective assistance of counsel in cases where the issue is "presented solely on the record of an appealed-from conviction." It argues that "[t]he 'deficient performance' element of an ineffective counsel claim should require defendant to show a gross deviation, clear on the record, from proper trial court practice." Appellee's Br. 20.

This Court, as well as the overwhelming number of appellate courts, has never required an ineffective of counsel claimant to demonstrate that counsel grossly deviated from normal trial court practice. The rule has been, and should continue to be:

> To successfully assert an ineffective assistance of counsel claim, a defendant must show that

(i) counsel's performance was deficient in some demonstrable manner so as to fall below an objective standard of reasonable professional judgment, and

(ii) there is a reasonable probability that but for the ineffective assistance, the result in the proceeding would have been more favorable to the defendant.

State v. Pascual, 804 P.2d 553, 555 (Utah Ct. App. 1991); see also Strickland v. Washington, 466 U.S. 668, 687-696, 104 S. Ct. 2052 (1984); State v. Templin, 805 P.2d 182, 186 (Utah 1990); State v. Montes, 804 P.2d 543, 545 (Utah Ct. App. 1991). The State's novel theory, which, in essence, heightens the threshold requirement for claimants raising ineffective assistance for the first time on appeal, should summarily be rejected.[1]

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[1] In addition, to the extent that the State insinuates that Villarreal's appellate counsel was somehow negligent for not seeking a trial court remand on the ineffectiveness claim under Rule 23B, Utah Rules of Appellate Procedure, see Appellee's Br. 20 n.7, counsel moves to strike that portion of the State's brief.

Rule 23B became effective October 1, 1992, the date on which Villarreal's Supplemental Opening Brief was filed in the Supreme Court. See In re Proposed Amendments to Utah Rules of Appellate Procedure, No. 920253 (S.Ct. August 10, 1992). Apart from the fact that Rule 23 was not in effect when Villarreal filed his briefs, the evidence pertinent to disposing this case are so clear on the record, such that an evidentiary hearing was not necessary.

Counsel takes this opportunity to admonish the Attorney General's Office to litigate its cases, particularly criminal cases, in such a way that the State taxpayers do not incur unnecessary expenses. The instant case presents a perfect example of how the Attorney General's Office, Criminal Division, could enmesh fiscal conservatism into its litigation strategy. Here, the trial record is adequately developed for disposing of Villarreal's ineffectiveness claim. Yet, the State would prefer another hearing in the court below, which hearing, counsel submits, would only produce a record similar to that currently before this Court.

POINT II

VILLARREAL HAS COHERENTLY DEMONSTRATED THAT HE WAS PREJUDICED BY COUNSEL'S DEFICIENT PERFORMANCE.

On page 29 of its brief, the State claims that "[d]efendant does not coherently attempt to show that he was prejudiced by counsel's alleged jury selection miscues. Instead, he urges this Court to presume prejudice. . . ." It is true that, relying on Presley v. State, 750 S.W.2d 602 (Mo. App.), cert. denied, 488 U.S. 975 (1988), Villarreal urges a presumption of prejudice, on the ground that no trial strategy allows counsel to sit two jurors who were inferentially biased because of their personal or familial experience as victims of sexual assault -- the same crime for which Villarreal was tried.[2] That argument, however, was an alternate to Villarreal's other argument that, under the standard enunciated by this Court in Woolley, he was

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(footnote 1, cont'd)

Further, in several places in its brief, the State urges this Court to not address some of the issues raised by Villarreal because they were not preserved for appeal or because the trial court did not rule on them. See, e.g., Appellee's Br. 19, 45. That those issue were not properly ruled upon and/or preserved for appeal is the essence of Villarreal's claim that trial counsel was ineffective.

[2] See State v. Woolley, 810 P.2d 440, 443 (Utah Ct. App.), cert. denied, 826 P.2d 651 (Utah 1991); Appellee's Br. 28.

clearly prejudiced by counsel's failure to challenge five jurors for cause in this case where the evidence against him was not overwhelming. See Appellant's Opening Br. 21; Appellant's Supp. Br. 14, 19.

POINT III

REFERENCES TO ALLEGATIONS IN DISMISSED COUNTS WERE OVERLY PREJUDICIAL AND COUNSEL'S FAILURE TO OBJECT TO THEM RENDERED HIS PERFORMANCE DEFICIENT.

The State concedes that references at Villarreal's trial to evidence of anal sodomy and rape, which counts had been dismissed at preliminary hearing, were improper under Rules 402, 403, and 404 of the Utah Rules of Evidence. See Appellee's Br. 36-37. The State goes on, however, to defend trial counsel, claiming that counsel's performance in not objecting to the admission of the evidence was "professionally []acceptable," because counsel made a strategic choice that "the references were not overly problematic." Appellee's Br. 37.

The State's inability to recognize the problem associated with the admission of such damaging evidence, see Appellee's Br. 37, also explains its inability to comprehend why "[d]efendant's explanation of the significance of preliminary hearing," Appellee's Br. 36, is germane to the question whether counsel's performance was constitutionally acceptable. First, a constitutionally acceptable defense counsel does not sit by and allow dismissed

allegations to be introduced against his or client. Cf. State v. Walters, 813 P.2d 857, 867 (Idaho 1990) (counsel's failure to object to prejudicial expert testimony was not objectively reasonable). Second, that those damaging allegations were allowed to resurface at trial without counsel's objection is the basis for Villarreal's claim that his preliminary hearing right as well as his right to a surprise-free trial were inadequately safeguarded, since he was not on notice that the State would attempt to prejudice the jury with those allegations. See, e.g., State v. Ortega, 751 P.2d 1138, 1140 (Utah 1988) (defendant could not be convicted of allegations that had been dismissed at preliminary hearing). Counsel's inadvertance in allowing clearly prejudicial evidence to be introduced by the State can hardly be seen as the making of a strategic choice. If it is harmful, any competent trial counsel would object to its introduction, especially before a jury.

POINT IV

ADMISSION OF BLAKE BEDIENT'S CONFESSION AGAINST VILLARREAL VIOLATED VILLARREAL'S RIGHT TO CONFRONTATION.

A. Confrontation Clause Violation:

The State argues that the admission of the confession of Blake Bedient, Villarreal's alleged accomplice, was proper under the confrontation clause of the Sixth Amendment and Rule 804(b)(3),

Utah Rules of Evidence. As the argument goes, since he had been separately tried and convicted,

> Bedient was no more than an ordinary witness of the events in question [at Villarreal's trial]. Therefore, the confrontation clause problems inhering in the use of a co-defendant's confession at a joint trial, see Lee v. Illinois, 476 U.S. 530, 542 (1986), and Bruton v. United States, 391 U.S. 123, 136-37 (1968), were not presented by Bedient's testimony. See United States v. Smith, 432 F.2d 1109, 1111 (7th Cir. 1970), and Faulkner v. State, 646 P.2d 1304, 1306 (Okla. 1982). . . .

Appellee's Br. 53.

Villarreal understands the State's argument to be thus: that a confrontation clause issue could only surface at a joint trial of codefendants or accomplices. Such a conclusion on the part of the State is clearly erroneous and misleading. A confrontation clause problem could arise, and has arisen, at separate trials of accomplices. And the courts have found inadmissible, because of confrontation clause problems, one accomplice's confession against another. See, e.g., State v. Watts, 452 N.W.2d 728 (Minn. Ct. App. 1990); State v. Standifur, 526 A.2d 955 (Md. 1987).

Thus, because he was an accomplice, Bedient clearly was more than "an ordinary witness" during Villarreal's trial. He was an accomplice whose hearsay confession was admitted against a criminal defendant, in violation of the confrontation clause. Villarreal certainly had no way to meaningfully cross-examine

Bedient who, as the State acknowledged, "mostly persisted in his refusal to answer [questions]." Appellee's Br. 54. It is axiomatic that a declarant who refuses to testify is unavailable for confrontation clause purposes. See United States v. Barlow, 693 F.2d 954 (6th Cir.), cert. denied, 461 U.S. 945 (1983). As such, analysis of Bedient's confession should have begun "with the presumption that such confessions are not firmly rooted and are inadmissible against the defendant except upon a particularized guarantee of reliability." Comment, Of Confrontation: The Right Not To Be Convicted On the Hearsay Declarations of An Accomplice, 1990 Utah L. Rev. 855, 878 ("Comment"). No such finding of particularized guarantee of trustworthiness was accomplished in this case. See Standifur, 526 A.2d at 955 (analyzing factors to be considered in determining reliability of an accomplice's confession). Therefore, the admission of Bedient's confession violated Villarreal's right of confrontation. See id.

B. Admission of the Confession under Rule 804(b)(3) is Unconstitutional:

The State also defends the trial court's admission of Bedient's confession against Villarreal under Rule 804(b)(3), which is the statement against penal interest hearsay exception. See Utah R. Evid. 804(b)(3). It argues that Rule 804(b)(3) represents such a "firmly-rooted hearsay exception," such that the proponent

of the evidence need not demonstrate the statement's -- here -- the confession's, reliability. Appellee's Br. 55.

After an in-depth study of Rule 804(b)(3), one commentator has noted that "[t]he [Supreme] Court has never considered declarations against penal interest as a 'firmly-rooted' hearsay exception[,]" and that Rule 804(b)(3) is plagued with numerous constitutional deficiencies. See Comment, at 877; see also Olsen v. Green, 688 F.2d 421, 427 n.11 (8th Cir.) (statements against penal interest "do not constitute a well-recognized exception to the hearsay rules"), cert. denied, 456 U.S. 1009 (1982); Note, Inculpatory Statements Against Penal Interest and the Confrontation Clause, 83 Colum. L. Rev. 159, 162 (1983) (statements against penal interest "were not well received at common law in either English or American courts"). Indeed, the Supreme Court rejected the prosecution's characterization of the hearsay involved in Lee "as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." Lee v. Illinois, 476 U.S. 530, 544 n.5 (1986) (emphasis added).

Again, the State's conclusion that the confrontation clause and/or Lee allows the admission of Bedient's confession

against Villarreal under Rule 804(b)(3) is erroneous.[3] First, it is unclear whether Bedient's statement to the police was in fact a non-collateral, against-interest confession under Rule 804. The confession was made in police custody, under circumstances in which Bedient had a motive to curry favor. See Standifur, 526 A.2d at 959-60 (confessions which implicate declarant and third party, particularly when made in police custody, are generally inadmissible because not actually against declarant's penal interest). Second, the confession was not sufficiently corroborated by circumstances surrounding its making. See id.; see also Comment, at 896 (confession not corroborated by totality of surrounding circumstances is inadmissible).

In short, the State did not even meet the threshold requirement for admitting an unavailable declarant's confession under Rule 804(b)(3). Even if the State met that standard, the admission in this case of Bedient's confession under Rule 804(b)(3) violated Villarreal's confrontation rights. See Watts, 452 N.W.2d at 731 (declaration against interest may comport with evidentiary rule and yet violate the confrontation clause).

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[3] To the extent that State v. Drawn, 791 P.2d 890, 894 (Utah Ct. App. 1990), found no confrontation clause problems in admitting an accomplice's confession against a criminal defendant under Rule 804(b)(3), Villarreal urges this Court to overrule it as inconsistent with Lee. See also Comment, at 892-94 (arguing that Drawn was incorrectly decided and urging that it be overruled).

POINT V

THE DISTRICT COURT COULD NOT HAVE CONSTITUTIONALLY ADMITTED BEDIENT'S CONFESSION UNDER RULE 801(d)(1)(A), UTAH RULES OF EVIDENCE.

To minimize the prejudice to Villarreal, the State argues that the district court adequately protected him by reducing the impact of Bedient's confession:

> Because Bedient denied that he had inculpated the defendant when he confessed to Hodgkinson, the trial court could have admitted the detective's report to the contrary as Bedient's non-hearsay prior inconsistent statement, under Rule 801(d)(1)(A), Utah Rules of Evidence. By excluding that portion of the Bedient's confession that directly inculpated defendant, the prosecution was denied powerful substantive evidence.

Appellee's Br. 56.

The state is entirely mistaken in assuming that Bedient's confession was admissible as a Rule 801(d)(1)(A) prior inconsistent statement. Utah Rules of Evidence, Rule 801(d)(1)(A), like its counterpart in 804(b)(3), does not give adequate consideration to the confrontation clause. The Advisory Committee note to Rule 801(d)(1)(A) recognizes the confrontation clause problem inherent in the rule under California v. Green, 399 U.S. 149 (1970).[4] See

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[4] In Green, the Supreme Court permitted the admission at trial of a prior inconsistent statement of a preliminary hearing witness against a criminal defendant. The Court found the testimony constitutionally admissible because the witness had testified under oath and was subject to cross-examination at the preliminary hearing. See Green, 399 U.S. at 165. Utah R. Evid. 801(d)(1)(A), on the other hand, allows for the admission of extrajudicial statements not made under oath as prior inconsistent statement.

Advisory Committee Note to Rule 801, reprinted in Utah Court Rules Annotated p. 584 (Michie 1990 & Supp. 1992).

Cognizant of the Court's decision in Green, the drafters of the Federal Rules of Evidence "allows only those [prior inconsistent statements] made while the declarant was subject to cross-examination at a trial or hearing or in a deposition, to be admissible for their truth" under Rule 801(d)(1)(A).[5] See Notes of the Committee on the Judiciary, House Report No. 93-650, reprinted in Graham, Handbook of Federal Evidence § 801.11, p. 722 (2d ed. 1986) ("Graham"); see also Notes of the Conference Committee, House Report, No. 93-1597, reprinted in Graham, at 723-24. See, e.g., United States v. Day, 789 F.2d 1217, 1222 (6th Cir. 1986) ("Several circuits have already incorporated the congressional intent into decisions that have refused to admit statements given under informal circumstances tantamount to a station house interrogation setting which later prove inconsistent

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[5] Federal Rules of Evidence, Rule 801(d)(1)(A), provides:

(d) **Statements Which Are Not Hearsay.** A statement is not hearsay if --

(1) **Prior Statements by Witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, . . .

with a declarant's trial testimony and have denied their admissibility as substantive evidence pursuant to 801(d)(1)(A). . . .").

Utah's Rule 801(d)(1)(A), on the other hand, deviates from the federal rule and provides for the admission of prior inconsistent statement even if, as here, the declarant did not make the extrajudicial statement under oath, subject to cross-examination. Compare Utah R. Evid. 801(d)(1)(A) with Fed. R. Evid. 801(d)(1)(A). The problems associated with Utah's approach is succinctly described by Professor Graham as follows:

> Rule 801(d)(1)(A) as promulgated by the Advisory Committee and prescribed by the Supreme Court, required only that the declarant be present at trial, give testimony, and be subject to cross-examination as to the prior inconsistent statement. Under Proposed Rule 801(d)(1)(A), oral and written statements not made at formal proceedings would have been included. Thus prior inconsistent statements outside the scope of Rule 801(d)(1)(A) but within the proposed rule include oral and written statements of witnesses made to investigators for insurance companies and police officers. The reliability of such statements is suspect, i.e., they are often biased as a result of subtle influence, coercion or deceit on the part of the person eliciting the statement. See, e.g., Statement by Herbert Semmell, Hearings on H.R. 5464 Before the Senate Comm. on the Judiciary, 93d Cong. 2d Sess. 302 (1974):
>
> > The problems of inaccurate repetition, ambiguity and incompleteness of out-of-court statements may be found in both written and oral statements, although the problem is more acute in oral statements. But written statements are also subject to distortion. We are all familiar with the way a skilled investigator, be he a lawyer, police officer,

> insurance claim agent, or private detective, can listen to a potential witness and then prepare a statement for signature by the witness which reflects the interest of the investigator's client or agency. Adverse details are omitted; subtle changes of emphasis are made. It is regrettable but true that some lawyers will distort the truth to win a case and that some police officers will do the same to "solve" a crime, particularly one which has aroused the public interest or caused public controversy. Or the police officer may be seeking to put away a "dangerous criminal" who the officer "knows" is guilty but against whom evidence is lacking.

See also Goings v. United States, 377 F.2d 753, 762 n. 13 (8th Cir. 1967):

> Today the art of statement taking is a recognized science. Inbau & Reid, Criminal Interrogation & Confessions (1962); Schwartz, Trial of Automobile Accident Cases, Vol. I, § 4, pp. 5, 6, "Requisites of Witnesses Statements," 3rd ed. (1965); Smithson, Insurance Law Journal, June, 1958, "Liability Claims and Litigation," pp. 375-403; Schweitzer, Cyclopedia of Trial Practice, Vol. I, § 30, p. 58, "Securing Statements from Witnesses" (1954); Donaldson Casualty Claims Practice, "Richard D. Erwin Series in Risk & Insurance" (1964), pp. 481-500; Averback, Handling Accident Cases, Vol. 2, p. 269 (1958). Whether the problem be one of fault in communication to a good faith interrogator or culpable strategy of the examiner, is immaterial. The fact remains, most ex parte statements reflect the subjective interest and attitude of the examiner as well.

With respect to statements not made at formal proceedings, the danger also exists that the asserted existence of the prior statement may be a fabrication. Implicitly rejected in this argument is the view that examination of either the declarant when he testifies in

> court or the witness presenting extrinsic proof of the prior inconsistent statement will successfully expose a fabrication or bring to light any illegitimate influence that acted to color the declarant's prior statement. For further discussion of Rule 801(d)(1)(A), see Graham, Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613 and 607, 75 Mich.L.Rev. 1565 (1977).

Graham, p. 732 n.13.

As such, as it currently stands, Rule 801(d)(1)(A), Utah R. Evid., does not pass muster under the confrontation clause of the Sixth Amendment to the United States Constitution, and Article 1, Section 12 of the Utah Constitution. Consequently, contrary to the State's assertion, the district court could not have constitutionally admitted Bedient's hearsay against Villarreal under Rule 801(d)(1)(A).

CONCLUSION AND PRECISE RELIEF SOUGHT

Independently or cumulatively, counsel's failure to competently represent Villarreal's interest as discussed above require a reversal. Further, the trial court erroneously admitted several damaging evidence against Villarreal. This Court should reverse Villarreal's conviction and remand this case for a new trial.

RESPECTFULLY SUBMITTED this _____ day of December, 1992.

RONALD J. YENGICH
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and correct copies of the foregoing Reply Brief of Appellant, postage prepaid, this _____ day of December, 1992, to R. Paul Van Dam, Utah Attorney General, and J. Kevin Murphy, Assistant Attorney General, at 236 State Capitol, Salt Lake City, Utah, 84114.

_____